IP 06-1560-C y/k Wallace v. Hounshel [3]
Magistrate Tim A. Baker Signed on 05/22/08

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CECELIA WALLACE,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:06-cv-01560-RLY-TAB
	)	
JERRY HOUNSHEL,	)	
MARC LAHRMAN,	)	
FAISAL AHMED,	)	
ADVANCED CORRECTIONAL	)	
HEALTHCARE, INC.,	)	
MISSY ROBINSON,	)	
DAVID RIDLEN,	)	
JOSH TEIPEN,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CECELIA WALLACE, individually and as the executor of the estate of William M. Wallace (deceased), Plaintiff,	)	
vs.	)	1:06-cv-1560- RLY-TAB
JERRY HOUNSHEL, individually and in his official capacity as SHERIFF OF JACKSON COUNTY, et al., Defendants.	)	

ORDER ON DISCOVERY MOTION

I. Introduction.

Before the Court is Plaintiff's motion to compel discovery and award sanctions, or in the alternative, to strike Defendants' expert witness. [Docket No. 70.] For the foregoing reasons, the Court grants Plaintiff's motion in part and strikes Defendants' expert witness.

II. Background.

Defendants Jerry Hounshel, Marc Lahrman, Missy Miser Robinson, David Ridlen, and Josh Teipen retained Dr. Bruce Waller as their expert witness in this case. Defendants provided Plaintiff with Dr. Waller's expert report on February 15, 2008, as required by Federal Rule of Civil Procedure 26(a)(2)(B). [Docket No. 70, Ex. 1.] In this report, Dr. Waller indicated that he did "not maintain lists of prior cases/reviews." [*Id*. at 5.] Plaintiff responded by letter on February 20, 2008, requesting that Dr. Waller clarify this statement and noting that if Dr. Waller had testified in prior cases, then his report would be deficient. [Docket No. 70, Ex. 2.] On February 29, 2008, Defendants provided Plaintiff with an addendum to Dr. Waller's report, in

which Dr. Waller provided a list of topics on which he had testified that was not necessarily limited to the prior four years. The addendum also included four case names without citations (except two included the county) that were obtained by defense counsel upon conducting a Lexis search; however, Dr. Waller also noted, "I do not recall any details and have no[] records for these cases." [Docket No. 70, Ex. 3 at 2.] Plaintiff again objected to the report, so Defendants conducted a Westlaw search and produced for Plaintiffs four more case names, indicating the counties, the nature of the cases, and in two instances the cause numbers. [Docket No. 70, Exs. 4-5.]

III. Discussion.

Plaintiff argues that Defendants have failed to satisfy Federal Rule of Civil Procedure 26(a)(2)(B), even after having provided them notice and two opportunities to cure the deficiencies. Thus, Plaintiff requests the Court compel these disclosures and award costs and fees or, in the alternative, that the Court strike Dr. Waller as an expert witness. Defendants argue that they have substantially complied with the rule and that to the extent they have not, Plaintiff is not harmed. Furthermore, Defendants characterize Plaintiff's request as "the extraordinary remedy of witness exclusion" and the alternative remedy as "something [Dr. Waller] has already stated he is unable to produce." [Docket No. 78 at 1.]

Rule 26(a)(2)(B) requires expert witnesses to disclose a written report containing, among other things, "a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition." Other jurisdictions have interpreted this provision as follows:

> The information to be disclosed is "cases" in which the witness has testified. The identification "cases" at a minimum should include the courts or administrative

> agencies, the names of the parties, the case number, and whether the testimony was by deposition or at trial. Such information should be sufficient to allow a party to review the proceedings to determine whether relevant testimony was given. With this information, a party should be able to determine the type of claim presented and locate any recorded testimony.

Bethel v. United States, Civil Action No. 05-cv-01336-PSF-BNB, 2007 U.S. Dist. LEXIS 43395 at *3-4 (D. Colo June 13, 2007); *Norris v. Murphey*, Civil Action 00-12599-RBC, 2003 U.S. Dist. LEXIS 10795, at *3-4 (D. Mass. June 26, 2003); *Nguyen v. IBP, Inc.*, 162 F.R.D. 675, 682 (D. Kan. 1995). Defendants' expert does not claim that his list of cases includes "all" cases in which he has testified in the last four years. Furthermore, the information included to identify these cases does not sufficiently enable Plaintiff to obtain the expert's testimony in them.

The consequences of failing to disclose this information are provided in Federal Rule of Civil Procedure 37(c)(1):

> If a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
> (B) may inform the jury of the party's failure, and
> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

According to this rule, because Defendants have failed to provide the required information, they must demonstrate that their failure was substantially justified or that it was harmless. The Seventh Circuit has provided four factors for the district court to consider when determining whether the failure to disclose was either substantially justified or harmless: "(1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness

involved in not disclosing the evidence at an earlier date." *David v. Caterpillar*, 324 F.3d 851, 857 (7th Cir. 2003).

Defendants argue that Plaintiff faces no risk of surprise since Plaintiff has time to explore any information about Dr. Waller's opinion through deposition before trial. They further argue that Plaintiff is not prejudiced by the fact that she will be unable to review Dr. Waller's prior testimony and opinions "given the scope of material that has been provided, the time remaining before trial, and the existence of the Plaintiff's own expert witness." [Docket No. 78 at 4.] They argue that Plaintiff may still depose Dr. Waller so the problem can be cured. Defendants contend that the trial, having not yet been scheduled, will not be disrupted by the expert's failure to comply with the rule. Finally, Defendants argue they have not acted in bad faith in their failure to disclose these cases.

Defendants' good faith is not in question. Likewise, because the expert's failure to disclose is not about the timing of disclosure but rather the ability to make a sufficient disclosure, trial disruption or surprise to Plaintiff are irrelevant.

Nevertheless, Defendants' failure to disclose is prejudicial. Having access to other cases in which the expert witness has testified "allow[s] the opposition to obtain prior testimony of an expert and, potentially, to identify inconsistent positions taken in previous cases for use in cross-examination." *Bethel*, 2007 U.S. Dist. LEXIS 43395, at *17. This testimony may also be useful to Plaintiff in ascertaining the legitimacy of Defendants' expert. *See Elgas v. Colorado Belle Corp.*, 179 F.R.D. 296, 300 (D. Nev. 1998) ("[T]he disclosure of prior recorded testimony is designed to give the other party access to useful information to meet the proposed experts' opinions. The proliferation of marginal or unscrupulous experts will only be stopped when the

other party has detailed information about prior testimony."). Furthermore, a deposition could not cure all prejudice to Plaintiff—Dr. Waller will not be able to reproduce his prior testimony at the deposition, particularly since he does "not recall any details" and has no records of these cases. [Docket No. 70, Ex. 3 at 2.]

Likewise, Defendants' reason—that their expert does not keep a list of cases—does not substantially justify their expert's failure to provide this information as required by the rule. *See Norris*, 2003 U.S. Dist. LEXIS 10795, at *11 ("An expert cannot deliberately put himself or herself in a position where it is impossible to comply with a rule and then claim that he or she cannot comply. Self-induced inability to comply with a rule is simply not justified."); *Palmer v. Rhodes Machinery*, 187 F.R.D. 653, 656 (N.D. Okla. 1999) (denying defendant's motion for relief from the reporting requirement determining that "the cost or difficulty of compiling the list is insufficient for the purpose of meeting the 'substantial justification' requirement" where defendant's expert did not believe he could compile a completely accurate list); *Nguyen*, 162 F.R.D. at 681 ("An expert's failure to maintain records in the ordinary course of his business sufficient to allow the disclosures to be made[] does not constitute 'substantial justification' for the failure to provide the required disclosures as to any retained expert expected to testify at the trial of the case."). Rule 26(a)—amended in 1993 to impose on parties the duty to disclose certain information without waiting for a request—requires expert witnesses be disclosed and that they provide a signed written report. Rule 26(a)(2)(B) lists specific requirements for the report, therefore delineating the basic criteria necessary for a witness to hold himself out as an "expert" in federal court. Dr. Waller has unambiguously stated that he cannot comply with one of those basic criteria. Ignoring the rule and allowing Dr. Waller to testify would reinforce

Defendants' failure to follow the rules and would lower the bar for other experts. Therefore, Dr. Waller is not permitted to testify in this case.

Defendants have requested that if they are prohibited from presenting Dr. Waller, that they be allowed a minimum of forty-five days to obtain a substitute expert witness. [Docket No. 85 at 3.] In affirming a district court's decision to deny witnesses who were belatedly disclosed as experts, the Seventh Circuit noted:

> In affirming this judgment, we are mindful of our warning that 'in the normal course of events, justice is dispensed by the hearing of cases on their merits. . . . We urge district courts to carefully consider Rule 37(c), including the alternate sanctions available, when imposing exclusionary sanctions that are outcome determinative."

Musser v. Gentiva Health Servs., 356 F.3d 751, 759-60 (7th Cir. 2004) (quoting *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 740 (7th Cir. 1998)). Defendants are unable to cure the prejudice to Plaintiff that would result if Dr. Waller were allowed to testify, so no sanction other than striking the witness is appropriate. However, in keeping with the spirit of the Seventh Circuit's admonition, the Court will enlarge the deadline by forty-five days from the date of this order for Defendants to produce an expert witness. As a result, and because a trial date has not yet been set, the Court shall also modify the dispositive motions deadlines and the date of the settlement conference.

IV. Conclusion.

For the above reasons, the Court GRANTS Plaintiff's motion in part and strikes Defendants' expert witness, Dr. Waller. [Docket No. 70.] Defendants shall have forty-five days from the date of this order in which to produce an expert witness and report conforming with Federal Rule of Civil Procedure 26(a)(2).

This enlargement of time for Defendants to produce an expert conflicts with the dispositive motion deadlines recently modified by the Court. [*See* Docket No. 81.] Therefore, the dispositive motion deadlines shall be modified as follows: Plaintiff's motion for summary judgment will be due on July 14, 2008; Defendants' motion for summary judgment and response to Plaintiff's motion will be due on August 14, 2008; Plaintiff's reply and her response to Defendants' motion will be due September 15, 2008; and Defendants' reply will be due September 29, 2008. The Court does not anticipate enlarging any of these deadlines, including the deadlines for response and reply briefs.

In addition, the **settlement conference currently set for July 1, 2008, at 9 a.m. is now vacated and rescheduled for August 20, 2008, at 1:30 p.m.** in Room 234. All requirements and deadlines established in the order originally setting the settlement conference remain in effect. [*See* Docket No. 58.]

Dated: May 22, 2008

/s/ Tim A. Baker
Tim A. Baker
United States Magistrate Judge
Southern District of Indiana

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